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State v. McNeil Appellant's Brief Dckt. 39881

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	
Plaintiff-Respondent,	NO. 39881
	ADA COUNTY NO. CR 2011-6449
v.	
LLOYD HARDIN MCNEIL,	APPELLANT'S BRIEF IN SUPPORT OF PETITION FOR REVIEW
Defendant-Appellant.	

STATEMENT OF THE CASE

Nature of the Case

Lloyd Hardin McNeil asks the Idaho Supreme Court to review the opinion of the Idaho Court of Appeals, 2014 Opinion No. 58 (Ct. App. November 8, 2013) (*hereinafter*, Opinion). He submits that the Opinion, which affirmed his Judgment of Conviction, is internally-inconsistent with respect to Mr. McNeil's two bases for challenging the sufficiency of the evidence for his voluntary manslaughter conviction, conflicts with, and fails to address, this Court's case law as to when the heat of passion can be said to

exist for voluntary manslaughter, and is in conflict with this Court's opinion in *State v. Severson*, 147 Idaho 694 (2009).

As relevant to the internal inconsistency argument, the Court of Appeals, in concluding that sufficient evidence supported a reasonable inference that the cause of death was homicide (rather than accidental), relied heavily on the medical examiner's conclusion that Ms. Davis died while incapacitated by a combination of high levels of alcohol and Benadryl, either accidentally (through her lying in a position that caused her to asphyxiate) or intentionally (via very little pressure applied to her chest or placing an object over her mouth and nose). (Opinion, pp.4-7.) Then, in concluding that the death occurred in the heat of passion, the Court of Appeals, providing minimal analysis, reasoned,

> Based on the record, there is evidence that Davis could have died during her fight with McNeil. Further, there is sufficient evidence to support a finding that "heat of passion" existed during the fight, as shown by the physical and verbal nature of the argument and fresh bruises on her body. Additionally, *heat of passion continued to exist after Davis' death as demonstrated by McNeil's actions of staging a fire, burning her body, stealing her possessions, and fleeing the state.* Accordingly, we conclude that sufficient evidence supports McNeil's conviction for the lesser-included offense of voluntary manslaughter.

(Opinion, pp.7-8 (emphasis added).)

Then, in considering the sufficiency of the evidence supporting the heat of passion element, the Court of Appeals conducted no discussion of, let alone did it attempt to distinguish, two of this Court's decisions – *State v. Grube*, 126 Idaho 377 (1994) and *State v. Beason*, 95 Idaho 267 (1973) – concerning when, as a matter of law, the heat of passion *cannot* be said to exist for purposes of voluntary manslaughter. Oddly, the Court of Appeals extended the reach of "heat of passion" to a period of

several hours, by including in the "heat of passion" Mr. McNeil's drive across Idaho and into Montana. This conclusion finds no support in this Court's case law, and is contradicted by the following language from Idaho Criminal Jury Instruction 707, which, in relevant part, provides, "The defendant would not be acting in heat of passion or sudden quarrel if sufficient time elapsed after the provocation for a reasonable person in the same circumstances to have regained self-control and for reason to have returned." I.C.J.I 707 (brackets omitted).

Finally, in reaching its decision concerning the sufficiency of the evidence presented as to Ms. Davis' cause of death – whether it was homicide or accidental – the Court of Appeals conflated two parts of the analysis conducted by this Court in *Severson*. Specifically, the Court of Appeals combined the analyses as to cause of death and the identity of the killer. In *Severson*, this Court considered the sufficiency of the evidence as to two elements of the first degree murder conviction: (1) the victim's cause of death, and (2) whether that "death was the result of the criminal agency of another."[1] *Severson*, 147 Idaho at 713.

With respect to the cause of death issue, the Idaho Supreme Court's reasoning was clearly expressed as follows:

> Despite Severson's assertions, there was substantial and competent evidence to support the jury's conclusion that he killed his wife by overdosing her, suffocating her, or both. Although Mary's cause of death was ultimately listed as "undetermined," a reasonable jury could have concluded that she was murdered. The autopsy performed by Dr. Groben revealed that Mary had lethal levels of Unisom in her system and toxic levels of Ambien. Dr. Groben only considered overdose a possible cause of death because there was evidence indicating Mary may have been suffocated. Mary's autopsy revealed that there were bruises and

[1] Severson argued that the two questions were together part of the *corpus delicti*. *Severson*, 147 Idaho at 713. Mr. McNeil has not advanced an identity argument.

> abrasions on her face and cuts on the inside of her lip. According to Dr. Groben, the marks were inconsistent with resuscitative efforts, but could have been caused by suffocation. More specifically, he believed that the marks were consistent with those that would result from being suffocated by someone's hand.

Id. at 713-14. Only after reaching this conclusion with respect to the cause of death element, did this Court address the issue concerning the identity of the killer, specifically addressing all of the evidence that supported the jury's determination that Severson was the person who committed the murder. *Id.* at 714-15.

If this Court grants his Petition as to the sufficiency issue, Mr. McNeil respectfully requests that it consider his remaining claims.

Statement of the Facts & Course of Proceedings

This case began when firefighters responded to a residential fire at 1209 South Lincoln Street in Boise at around noon on March 5, 2011. (Tr., p.308, L.6 – p.309, L.16.) After entering the house, firefighters determined that the fire was in a bedroom on the main floor. The fire was mainly confined to the mattress and box spring located along the wall of the bedroom. After the fire was extinguished, Firefighter John Suter was ordered by his supervisor, Captain Jim Rabbitt, to remove the mattress from the room. Mr. Suter explained that he entered the room, which was "pretty smoky" and "walked to the area where [he] thought the fire was and found the corner of a mattress and kind of lifted it up to check it out."[2] He explained, "Sometimes mattresses melt together, and it appeared to me that it did that to me." Because the mattresses were stuck together, Mr. Suter asked for help, saying, "'Hey Captain Rabbitt, I need some

[2] The room was so smoky that he could not see the mattress, but located it by touch. (Tr., p.325, L.22 – p.327, L.21.)

help with this mattress. I think it's melted together.'" Ultimately, Captain Rabbitt removed the mattress from the room by himself, and Mr. Suter assisted in placing the mattress in the backyard. (Tr., p.310, L.16 – p.313, L.17.)

Firefighter Casey Wilson and Senior Firefighter J.J. McCullough searched the house for persons in need of assistance. They started with the basement before searching the bedroom. Because of low visibility, they searched the bedroom on their hands and knees. During their search, they located Ms. Davis' body on the box spring under a blanket. (Tr., p.337, L.5 – p.341, L.4.) This caused them to suspect that the room could be a crime scene, and they secured the room from further disturbance. (Tr., p.344, L.15 – p.345, L.4.) Senior Firefighter McCullough believed that "the mattress had been, you know, on her from the way she was there and the burn."[3] (Tr., p.368, Ls.8-10.)

As relevant to the arson charge, testimony was presented from expert witnesses, including an agent of the Bureau of Alcohol, Tobacco, Firearms, and Explosives, who had the contents of the room, including the electrical devices damaged in the fire examined, ultimately concluding that the fire was "human-caused," "on purpose," and not accidental. (Tr., p.973, L.3 – p.975, L.3.) As relevant to the grand theft charge, evidence was presented that, the day of her death, Mr. McNeil drove a vehicle registered to Ms. Davis to Montana where he dropped her two dogs off at a no-kill animal shelter using a false name and arranged for a friend to pawn a diamond

[3] At trial, the position of Ms. Davis' body at the time the firefighters arrived was hotly disputed, with defense counsel maintaining that Ms. Davis' body was on top of the mattress before the firefighters yanked the mattress off of the box spring, presumably causing her to roll onto the box spring. (Tr., p.1085, L.16 – p.1093, L.6.)

engagement ring that belonged to Ms. Davis' mother and had been in Ms. Davis' possession. (Tr., p.224, L.2 – p.226, L.22; Supp.Tr., p.45, L.20 – p.47, L.10, p.50, L.10 – p.51, L.25.) An appraiser valued the ring at $4,450. (Tr., p.1030, L.11 – p.1032, L.13.)

Mr. McNeil was charged by Indictment with murder in the second degree, arson in the first degree, and grand theft. (R., pp.23-24.) Following a jury trial, he was acquitted of murder in the second degree, convicted of the lesser-included offense of voluntary manslaughter, and convicted of both arson in the first degree and grand theft. (R., pp.256-59.) The district court imposed consecutive sentences of fifteen years fixed for voluntary manslaughter, twenty-five years, with ten years fixed, for arson in the first degree, and fourteen years, all of it indeterminate, for grand theft. (R., p.262.) Mr. McNeil filed a Notice of Appeal timely from the judgment of conviction. (R., p.265.)

Mr. McNeil then filed a timely Idaho Criminal Rule 35 (*hereinafter,* Rule 35) motion, along with a supporting brief containing new information. (R., pp.283-89.) Ultimately, the district court denied the Rule 35 motion, explaining, "This was a very serious case. The Court stated its reasons for the sentence on the record and remains convinced that the sentence [sic] was appropriate." (Order Denying Motion for Reconsideration Under ICR 35, p.2.)

The Idaho Court of Appeals affirmed Mr. McNeil's convictions, upheld his sentences, and affirmed the denial of his Rule 35 motion, after which he filed a Petition for Review with this Court.

ISSUES

1. Is the Idaho Court of Appeals' Opinion affirming Mr. McNeil's Judgment of Conviction internally-inconsistent and in conflict with this Court's decisions in *State v. Grube*, *State v. Beason*, and *State v. Severson*?

2. Were Mr. McNeil's constitutional rights violated by the prosecutor's unobjected-to misconduct?

3. Did the district court abuse its discretion when it imposed a combined sentence of fifty-four years, with twenty-five years fixed, following his convictions for voluntary manslaughter, arson in the first degree, and grand theft?

4. Did the district court abuse its discretion when it denied Mr. McNeil's Rule 35 motion?

ARGUMENT

I.

The Idaho Court Of Appeals' Opinion Affirming Mr. McNeil's Judgment Of Conviction Is Internally-Inconsistent And In Conflict With This Court's Decisions In *State v. Grube*, *State v. Beason*, And *State v. Severson*

A. Introduction

The Idaho Court of Appeals' Opinion, which affirmed Mr. McNeil's Judgment of Conviction, is internally-inconsistent with respect to Mr. McNeil's two bases for challenging the sufficiency of the evidence for his voluntary manslaughter conviction, conflicts with, and fails to address, this Court's case law as to when the heat of passion can be said to exist for voluntary manslaughter, and is in conflict with this Court's opinion in *State v. Severson*, 147 Idaho 694 (2009). As such, this Court should grant his Petition for Review, vacate the judgment of conviction for voluntary manslaughter, and remand this matter for entry of a judgment of acquittal on the charge of voluntary manslaughter.

As relevant to the internal inconsistency issue, the Court of Appeals, in concluding that sufficient evidence supported a reasonable inference that the cause of death was homicide (rather than accidental), relied heavily on the medical examiner's conclusion that Ms. Davis died while incapacitated by a combination of high levels of alcohol and Benadryl, either accidentally (through her lying in a position that caused her to asphyxiate) or intentionally (via very little pressure applied to her chest or placing an object over her mouth and nose). (Opinion, pp.4-7.) Then, in concluding that the death occurred in the heat of passion, the Court of Appeals, providing minimal analysis, reasoned,

> Based on the record, there is evidence that Davis could have died during her fight with McNeil. Further, there is sufficient evidence to support a finding that "heat of passion" existed during the fight, as shown by the physical and verbal nature of the argument and fresh bruises on her body. Additionally, *heat of passion continued to exist after Davis' death as demonstrated by McNeil's actions of staging a fire, burning her body, stealing her possessions, and fleeing the state.* Accordingly, we conclude that sufficient evidence supports McNeil's conviction for the lesser-included offense of voluntary manslaughter.

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Then, in considering the sufficiency of the evidence supporting the heat of passion element, the Court of Appeals conducted no discussion of, let alone did it attempt to distinguish, two of this Court's decisions – *State v. Grube*, 126 Idaho 377 (1994) and *State v. Beason*, 95 Idaho 267 (1973) – concerning when, as a matter of law, the heat of passion *cannot* be said to exist for purposes of voluntary manslaughter. Oddly, the Court of Appeals extended the reach of "heat of passion" to a period of several hours, by including in that "heat of passion" Mr. McNeil's drive across Idaho and into Montana. This conclusion finds no support in this Court's case law, and is contradicted by the following language from Idaho Criminal Jury Instruction 707, which, in relevant part, provides, "The defendant would not be acting in heat of passion or sudden quarrel if sufficient time elapsed after the provocation for a reasonable person in the same circumstances to have regained self-control and for reason to have returned." I.C.J.I 707 (brackets omitted).

Finally, in reaching its decision concerning the sufficiency of the evidence presented as to Ms. Davis' cause of death – whether it was homicide or accidental – the Court of Appeals conflated two parts of the analysis conducted by this Court in *Severson*. Specifically, the Court of Appeals combined the analyses as to cause of

death and the identity of the killer. In *Severson*, this Court considered the sufficiency of the evidence as to two elements of the first degree murder conviction: (1) the victim's cause of death, and (2) whether that "death was the result of the criminal agency of another."[4] *Severson*, 147 Idaho at 713.

With respect to the cause of death issue, the Idaho Supreme Court's reasoning was clearly expressed as follows:

> Despite Severson's assertions, there was substantial and competent evidence to support the jury's conclusion that he killed his wife by overdosing her, suffocating her, or both. Although Mary's cause of death was ultimately listed as "undetermined," a reasonable jury could have concluded that she was murdered. The autopsy performed by Dr. Groben revealed that Mary had lethal levels of Unisom in her system and toxic levels of Ambien. Dr. Groben only considered overdose a possible cause of death because there was evidence indicating Mary may have been suffocated. Mary's autopsy revealed that there were bruises and abrasions on her face and cuts on the inside of her lip. According to Dr. Groben, the marks were inconsistent with resuscitative efforts, but could have been caused by suffocation. More specifically, he believed that the marks were consistent with those that would result from being suffocated by someone's hand.

Id. at 713-14. Only after reaching this conclusion with respect to the cause of death element, did this Court address the issue concerning the identity of the killer, specifically addressing all of the evidence that supported the jury's determination that Severson was the person who committed the murder. *Id.* at 714-15.

B. The Idaho Court Of Appeals' Opinion Affirming Mr. McNeil's Judgment Of Conviction Is Internally-Inconsistent And In Conflict With This Court's Decisions In *State v. Grube*, *State v. Beason*, And *State v. Severson*

Mr. McNeil was convicted of the lesser-included offense of voluntary manslaughter after being acquitted of murder in the second degree. (R., pp.256-57.) In

[4] Severson argued that the two questions were together part of the *corpus delicti*. *Severson*, 147 Idaho at 713. Mr. McNeil has not advanced an identity argument.

order for his conviction to withstand a sufficiency challenge, the evidence before the jury must have been sufficient to establish all elements of the offense. As relevant to this case, voluntary manslaughter is "the unlawful killing of a human being . . . without malice . . . upon a sudden quarrel or heat of passion." I.C. § 18-4006(1). Thus, in order for the jury's verdict to stand, the record must contain sufficient evidence that he was the person who killed Ms. Davis, and that he did so "upon a sudden quarrel or heat of passion." On appeal, Mr. McNeil asserts that an examination of the evidence demonstrates that the State failed to present substantial, competent evidence as to either of these elements.

Matthew Hess, Ms. Davis' older brother, testified that he shared a house with Ms. Davis for the three months prior to her death, and that his bedroom was in the basement. Mr. McNeil moved in about six weeks before Ms. Davis' death. Mr. Hess testified that, on the day of his sister's death, he had set his alarm clock for 6:45 a.m., but was awakened at about 6:30 a.m. by the sound of Ms. Davis and Mr. McNeil arguing. He could hear Ms. Davis "telling Hardin to get out, like, 'Why are you here?' Those kind[s] of things." He didn't hear what Mr. McNeil said, although he heard his voice. He then heard "[s]ome loud noises, banging, like the sound of stomping feet, or maybe somebody slamming a door repeatedly," after which "the arguing subsided." A few minutes later, his alarm went off and he went upstairs to use the bathroom where he saw Mr. McNeil and Ms. Davis on the futon in the living room. He spoke briefly to Mr. McNeil, and saw that his sister was sleeping next to him. After using the bathroom and making some coffee, Mr. Hess went back downstairs for thirty minutes. He then

went back upstairs, took a shower, and saw Ms. Davis and Mr. McNeil asleep on the couch when he left for work no later than 7:45 a.m. (Tr., p.610, L.13 – p. 624, L.9.)

Dr. Charles O. Garrison, a pathologist employed by the Ada County Coroner's Office who conducted the autopsy in this case, testified that Ms. Davis had an elevated level of alcohol, specifically a blood alcohol content of .141, which was "not in a lethal level" and a higher than normal level of dyphenhydramine (more commonly known by the brand-name Benadryl) in her system at the time of her death. (Tr., p.533, Ls.8-23.) Dr. Garrison testified that the combined alcohol and Benadryl levels in Ms. Davis' system at the time of her death were enough to "suppress the respiratory system" to the extent that she could have died accidentally by lying in a position in which her ability to breath was compromised or could have died "as a result of suffocation with very little compression on [her] chest . . . done . . . by some other person."[5] (Tr., p.560, Ls.1-23.) None of the typical indications of intentional suffocation were present in this case. (Tr., p.586, Ls.6-9), nor were any signs of blunt force trauma "that would cause death." (Tr., p.558, Ls.13-17.)

Dr. Gary Dawson, a clinical pharmacologist and toxicologist, testified concerning his conclusions regarding the alcohol and Benadryl levels in Ms. Davis at the time of her death. He testified that the level of Benadryl in her blood was three to four times higher than would be present with a normal dose. While it was not enough to be toxic,

[5] Dr. Garrison explained that it doesn't take much to cause a person with a depressed respiratory system to stop breathing. He explained, "if a person is intoxicated, they can simply lay down on the floor, put their head against the wall, put their chin on their chest, and they can die. That doesn't require much pressure." (Tr., p.595, L.24 – p.596, L.4.) Likewise, "[i]f someone is on someone's chest, just the body pressure alone would be sufficient if the person is intoxicated and can't fight back." (Tr., p.596, Ls.5-7.)

"certainly from the standpoint of this would be an excessive amount that would cause – I would be concerned about extreme sedation associated with a blood level that high." Alcohol has an "additive effect" with Benadryl, which is why alcohol use is contraindicated when using Benadryl. Although the combined effect would be great enough to cause a person to be "very difficult to arouse . . . without what we call painful stimulation," it was "possible, but not probable" that it could be fatal. (Tr., p.598, L.8 – p.609, L.21.)

Ultimately, Dr. Garrison was unable to determine the cause or manner of Ms. Davis' death.[6] He testified that as part of his attempt to determine the cause and manner of death, he considers all information available, including information gathered from the police and other sources, which was something he did in this case. This included considering the fact that Ms. Davis' body was believed to have been between the box spring and mattress when the post-mortem fire occurred. (Tr., p.536, L.1 – p.538, L.2.) As part of his analysis, Dr. Garrison also consulted with a toxicologist regarding the potential lethality of the Benadryl and alcohol levels present. (Tr., p.535, Ls.2-19.) He did note that while he was "very suspicious that this is other than an accident. I can't prove it. There is no way I can prove it." (Tr., p.561, Ls.8-10.) He explained that he was unable to form any opinion as to the cause and manner of death because any such opinion would be "a matter of speculation" and could not be proven. (Tr., p.558, Ls.2-12.)

[6] Dr. Garrison was also unable to determine a precise time of death, guessing that it was "somewhere in the range of three hours, three to four hours, but I can't be accurate on that." (Tr., p.589, Ls.4-18.)

Detective Ayotte testified, and was asked whether, in interviewing Mr. McNeil, he was attempting to get a confession to which he responded by saying, "In this case I was attempting to get him to make an admission to having been responsible for Natalie's death." He was then asked, "And it didn't work, did it?" to which he responded, "He didn't make an admission direct [sic]." (Supp.Tr., p.243, Ls.4-14.) A video recording of Detective Ayotte's interrogation of Mr. McNeil was admitted as State's Exhibit No. 295. (Supp.Tr., p.234, L.9 – p.235, L.22.) Nowhere in the video of the interrogation did Mr. McNeil admit to causing Ms. Davis' death. (State's Exhibit No. 295.)

Applying the above-recited facts to the law, Mr. McNeil asserts that the evidence presented at trial was insufficient to support the jury's verdict of guilty as to the charge of voluntary manslaughter. Specifically, the State failed to present substantial, competent evidence with respect to two elements, namely: (1) that Mr. McNeil committed an act that caused Ms. Davis' death, and (2) that Ms. Davis' death resulted from a sudden quarrel or heat of passion.

1. Cause Of Death Element

With respect to the causation element, Mr. McNeil asserts that the evidence presented at trial, even viewed in the light most favorable to the State, was not sufficient to establish that *any* person, let alone he, caused the death of Ms. Davis. As detailed above, the State's expert witnesses were unable to establish a cause or manner of death, and could not determine whether her death was accidental or intentional, even considering the suspicious circumstances surrounding the discovery of the body. Furthermore, Mr. McNeil made no inculpatory statements concerning his role in Ms. Davis' death.

The facts of Mr. McNeil's case are distinguishable from those of a recent case, *State v. Severson*, 147 Idaho 694 (2009), in which the Idaho Supreme Court held that the medical examiner's conclusion that the cause of a victim's death was "undetermined" did not render the evidence insufficient to sustain a conviction for first-degree murder. Severson's sufficiency claim was based on case law from two other jurisdictions. *Severson*, 147 Idaho at 713. In rejecting his claim, the Court distinguished the cited cases, explaining that unlike the facts in those cases, in Severson's case, "there was no evidence indicating [the victim] died of natural causes." Specifically, "[t]he State's medical expert, Dr. Glenn Groben, testified that [the victim's] death was the result of a drug overdose, suffocation, or a combination of both. The only reason he listed her death as 'undetermined' was because the evidence supported both possible causes of death." *Id.*

Unlike the facts in *Severson*, here there was testimony that the medical examiner could not determine the cause and manner of Ms. Davis' death because he could not determine whether her death was accidental or due to the intentional act of another person. Considering this, and in light of the complete failure of the State to establish evidence that *any* person, let alone Mr. McNeil, caused Ms. Davis' death, his conviction for voluntary manslaughter cannot be said to have been supported by substantial, competent evidence and must be vacated with remand for entry of a judgment of acquittal.

2. Sudden Quarrel Or Heat Of Passion Element

With respect to the element requiring that the death be the result of a sudden quarrel or heat of passion, Mr. McNeil asserts that no evidence, let alone substantial,

competent evidence, was presented to support the jury's conclusion that Ms. Davis' death was the result of a sudden quarrel or heat of passion. Undisputed evidence indicated that Ms. Davis had ingested quantities of alcohol and Benadryl such that a normal person would have been "very difficult to arouse . . . without what we call painful stimulation."[7] (Tr., p.606, Ls.7-14.) It is difficult to imagine how a person who is passed out cold could possibly have participated in a "sudden quarrel" let alone aroused the "heat of passion" in another person. A review of several cases upholding a district court's decision not to instruct as to voluntary manslaughter in the absence of evidence of a sudden quarrel or heat of passion is helpful in this analysis.

In *State v. Grube*, 126 Idaho 377 (1994), Grube appealed following his conviction for murder in the first degree arguing that the district court erred when it refused to give a voluntary manslaughter instruction. The facts of Grube's case were that the victim "was murdered while she slept in her bedroom in the early morning hours of June 4, 1983, by a single shotgun blast through a small basement window above her bed." *Grube*, 126 Idaho at 379. Facts to which Grube pointed as supporting a voluntary manslaughter instruction were that "the curtain over the window was closed at the time of the murder; there was evidence [the victim] moved the furniture around in her room; and, there was testimony by Johnna Sans that Grube told her whoever shot [the victim] did so by accident." The Idaho Supreme Court summarized Grube's argument as being that the "evidence indicates that the murder may have been literally a 'shot in the dark,' with the murderer lacking a specific intent to kill." *Id.* at 380.

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[7] The testimony also established that while a person with a high tolerance for alcohol would be less difficult to arouse than the average person, such a person would still "fall asleep very easily" and "be very difficult to arouse." (Tr., p.606, Ls.15-20.)

In rejecting Grube's argument, the Court explained that it agreed with the district court "that there is no reasonable view of the evidence which would support giving the jury the requested instructions on . . . voluntary manslaughter," explaining, "[T]here was absolutely no evidence to support an instruction on voluntary manslaughter because there was no indication the murder took place in the 'heat of passion.'" *Id.* at 381 (citing I.C. § 18-4006). The Idaho Supreme Court had reached the same conclusion in *State v. Beason*, 95 Idaho 267 (1973), in which it found no error in the district court's refusal to instruct the jury on the lesser-included offense of voluntary manslaughter where there was "nothing in the evidence before the court which would in any way indicate that the accused acted upon a 'sudden quarrel or heat of passion.'" *Beason*, 95 Idaho at 276.

If the evidence in *Grube* involving an unconscious victim with no evidence of sudden quarrel or heat of passion was not sufficient to require even a jury instruction on voluntary manslaughter,[8] a similar lack of evidence in Mr. McNeil's case cannot be said to represent the substantial, competent evidence necessary to support his voluntary manslaughter conviction. Furthermore, both *Grube* and *Beason* stand for the rather unremarkable principle that the absence of evidence of a sudden quarrel or heat of passion, as existed in Mr. McNeil's case, precludes a conviction for voluntary manslaughter.

[8] Mr. McNeil notes that very little evidence is required to necessitate giving an instruction requested by a party. *See* I.C. § 19-2132(b)(2) (the jury must be instructed on a lesser-included offense when requested by a party if "[t]here is a reasonable view of the evidence presented in the case that would support a finding that the defendant committed the lesser included offense but did not commit the greater offense.").

Given the total lack of evidence that Ms. Davis' death was the result of a sudden quarrel or heat of passion, there was no evidence, let alone substantial, competent evidence, from which the jury could have concluded that Mr. McNeil was guilty of voluntary manslaughter. As the jury's verdict of guilty for voluntary manslaughter was not supported by substantial, competent evidence, Mr. McNeil's conviction must be vacated, with this matter remanded to the district court for entry of a judgment of acquittal on the charge of voluntary manslaughter.[9]

II.

Mr. McNeil's Constitutional Rights Were Violated By The State's Unobjected-To Misconduct

A. Introduction

Mr. McNeil asserts that his constitutional rights were violated when the State committed unobjected-to prosecutorial misconduct in its closing argument. Specifically, by twice indirectly commenting on his silence, the State violated his Fifth and Fourteenth Amendment rights not to testify. The State also violated his right to due process and a fair trial when it made an inflammatory comment describing Ms. Davis as being "a helpless victim, helpless adult, like a baby," and when, in rebuttal closing, it falsely told the jury, "I guess they concede the grand theft," insulted and denigrated defense counsel's function in our system of justice, told the jury not to let Mr. McNeil "get away with murder," and sought to evoke sympathy for the victim by arguing that Mr. McNeil "stole her last breath, her most valuable possession."

[9] Mr. McNeil expresses no opinion as to whether he may be subject to a new trial on the lesser-included offense of involuntary manslaughter as the jury never considered that charge because it was instructed, consistent with Idaho law, to consider the charges in the order of seriousness, the so-called "acquit first doctrine." (R., pp.246-47.)

B. Standard Of Review

The standard of review for unobjected to error as set forth by the Idaho Supreme Court in *State v. Perry*, 150 Idaho 209 (2010), is as follows:

> If the alleged error was not followed by a contemporaneous objection, it shall only be reviewed by an appellate court under Idaho's fundamental error doctrine. Such review includes a three-prong inquiry wherein the defendant bears the burden of persuading the appellate court that the alleged error: (1) violates one or more of the defendant's unwaived constitutional rights; (2) plainly exists; and (3) was not harmless. If the defendant persuades the appellate court that the complained of error satisfies this three-prong inquiry, then the appellate court shall vacate and remand.

Id. at 228.

C. Mr. McNeil's Constitutional Rights Were Violated When The State Committed Unobjected-To Misconduct In Its Closing Argument

1. The State's Indirect Comments On Mr. McNeil's Silence Constituted Fundamental Error In Violation Of His Fifth And Fourteenth Amendment Rights Not To Testify

"[T]he Fifth Amendment . . . forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." *Griffin v. California*, 380 U.S. 609, 615 (1965). "Indirect references to the defendant's failure to testify are constitutionally impermissible if 'the language used was manifestly intended to be or was of such a character that the jury would naturally and necessarily take it to be a comment on the defendant's failure to testify.'" *Williams v. Lane*, 826 F.2d 654, 664 (7th Cir. 1987) (quoting *U.S. v. Lyon*, 397 F.2d 505, 509 (7th Cir. 1968)).

"Idaho follows the overwhelming number of jurisdictions holding that a prosecutor's general references to uncontradicted evidence do not necessarily reflect on the defendant's failure to testify, where *witnesses other than the defendant* could

have contradicted the evidence." *State v. McMurry*, 143 Idaho 312, 314 (Ct. App. 2006) (citing *Lincoln v. Sunn*, 807 F.2d 805, 810 (9th Cir. 1987) and *Raper v. Mintzes*, 706 F.2d 161, 164 (6th Cir. 1983)) (emphasis in original). In *Lincoln v. Sunn*, the Court noted, "Courts have distinguished between those cases in which the defendant is the sole witness who could possibly offer evidence on a particular issue, and those cases in which the information is available from other defense witnesses as well." *Lincoln,* 807 F.2d at 810.

In *McMurry*, the Court noted that whether a prosecutor's comments on the lack of defense evidence contradicting the State's case can result in a *Griffin* violation "depend[s] on the number and nature of those comments[,]" and that "[c]ourts uniformly condemn this prosecutorial tactic due to the difficulty of determining whether *Griffin* violations are constitutionally harmless." *McMurry,* 143 Idaho at 314-15 (citing *Lincoln*, *Raper*, and *U.S. v. Castillo*, 866 F.2d 1071, 1084 (9th Cir. 1989)).

In *Raper*, relied on by the Court in *McMurry*, the defendant was convicted of, *inter alia*, the premeditated, first-degree murder of his estranged wife, Brenda. *Raper,* 706 F.2d at 162. The woman's boyfriend, Sam Kobel, was the only eyewitness, and testified that Brenda answered the door when the defendant knocked, and that he heard her ask "What are you doing here?" and "What do you have that for?" to which there was no response. *Id.* Kobel then heard gunshots, ran toward Brenda, and saw her fall to the ground. *Id.* The main issue of contention at trial was whether the murder of Brenda was premeditated, with defense counsel arguing that it was possible that the defendant went to the house to throw Kobel out (by threatening him with the gun), and that he only killed Brenda in a moment of rage. *Id.* at 165.

The prosecutor, in his rebuttal closing argument, repeatedly stated that the testimony as to what happened was uncontradicted. 706 F.2d at 165-66. The prosecutor's argument included stating, "The facts were presented, and no one contradicted anything that Sam Kobel said. No witness contradicted it. The physical facts don't contradict it." *Id.* at 165. The prosecutor went on to argue, "His testimony has just not been refuted. It's not been contradicted." *Id.* Later, the prosecutor argued, "Let's look at Howard Samuel Kobel's testimony. No one's disputed it in any sense . . . No one, no one witness has contradicted the testimony, the events of that evening as relayed to you by Sam Kobel."[10] *Id.* at 166.

Although the prosecutor's comments did not directly state that the defendant had not testified, the Court nonetheless held that it was "unable to conceive of any other reasonable inference which could be drawn from the prosecutor's comments" because only the defendant could have contradicted the government's evidence. 706 F.2d at 166-67. The Court also found it significant that the prosecutor "made at least five indirect references to the [defendant]'s failure to testify." *Id.* at 167. Ultimately, the Court concluded that "the fact that the prosecutor made repeated comments about the uncontradicted nature of the evidence is the dispositive factor in this case." *Id.* The Court reversed the first degree murder conviction, finding that the error was not harmless. *Id.* at 167.

In Mr. McNeil's case, the prosecutor twice commented on his failure to testify. The first instance occurred when the prosecutor argued, "He put that body between the mattress and the box springs. We know that's a staged scene. You know that's a

[10] In *Raper*, as in Mr. McNeil's case, the prosecutor's comments were not objected to by defense counsel. *Raper,* 706 F.2d at 163.

staged scene. *There has been no testimony other than that.*" (Tr., p. 1069, Ls.8-11 (emphasis added).) The second instance involved the prosecutor arguing, "And, of course, we know she was dead before the fire, so the fire didn't kill her, and she had been dead some time before the fire because the lividity had set in, *so there is a small window there nobody can really know except the defendant. He's the only person who lived through it.*" (Tr., p.1081, Ls.14-20 (emphasis added).)

The nature of the State's comments is particularly troublesome. As the State acknowledged in the second statement, the only person alive who knows what happened is Mr. McNeil. *See McMurry,* 143 Idaho at 315 ("Comment on the absence of evidence contradicting the state's case is particularly problematic where the defendant is the *sole witness* who would be able to contradict the evidence in question." (emphasis in original)) (citing *People v. Hughes*, 39 P.3d 432 (Cal. 2002); *Hughes,* 39 P.3d at 487 ("Pursuant to *Griffin*, it is error for a prosecutor to state that certain evidence is uncontradicted or unrefuted when the evidence could not be contradicted or refuted by anyone other than the defendant testifying on his or her own behalf."); *State v. Scutchings*, 759 N.W.2d 729, 732 (N.D. 2009) ("[I]t is well established that a prosecutor's comment that the government's evidence is uncontradicted or unrebutted is improper and violates the *Griffin* rule if the only person who could have rebutted the evidence was the defendant testifying on his or her own behalf." (citations omitted)); *State v. Padilla*, 552 P.2d 357, 362-63 (Haw. 1976) ("The prosecution is entitled to call attention to the fact that the testimony of the witnesses for the prosecution has not been controverted, unless the circumstance that the defendant is the only one who could possibly contradict that testimony would necessarily direct the jury's attention solely to

the defendant's failure to testify." (citations omitted)); J. Evans, Annotation, *Comment or Argument by Court or Counsel that Prosecution Evidence is Uncontradicted as Amounting to Improper Reference to Accused's Failure to Testify*, 14 A.L.R. 3d 723, II. § 4 (1967)[11] ("Where a trial judge or a prosecuting attorney remarks that evidence offered by the prosecution is uncontradicted, and where defendant is the only person who could or would have contradicted the evidence, it is generally held that the comment refers to defendant's failure to testify and is thus improper.").

An examination of the three prongs of *Perry* reveals that the error is fundamental and necessitates a new trial. With respect to the first prong, whether the error violated one of Mr. McNeil's unwaived constitutional rights, Mr. McNeil notes that the case law cited *supra* demonstrates that the misconduct violated his Fifth and Fourteenth Amendment rights not to testify. With respect to the second prong, whether the error was plain or obvious, Mr. McNeil again cites to the voluminous case law cited *supra*. Finally, with respect to the third prong, whether the error was harmless beyond a reasonable doubt, he notes that in light of the State's incredibly weak case for second-degree murder, resulting in a verdict of not guilty on that charge and a conviction of the lesser-included charge of voluntary manslaughter, along with the weakness of the evidence supporting that conviction, identified in part I *supra*, it is impossible to conclude that the error in this case was harmless beyond a reasonable doubt.

[11] This A.L.R. was cited by the Idaho Court of Appeals in *McMurry*. *See McMurry*, 143 Idaho at 315.

2. The State Violated Mr. McNeil's Constitutional Right To Due Process And A Fair Trial With Its Inflammatory Comments Including Those Describing The Victim As "Like A Baby," Stating That Defense Counsel Had Conceded His Guilt On The Charge Of Grand Theft, And Insulting And Denigrating The Role Of Defense Counsel In Our System Of Justice

In *Perry*, the Idaho Supreme Court explained,

> Where a prosecutor attempts to secure a verdict on any factor other than the law as set forth in the jury instructions and the evidence admitted during trial, including reasonable inferences that may be drawn from that evidence, this impacts a defendant's Fourteenth Amendment right to a fair trial.

Perry, 150 Idaho at 227. The Idaho Court of Appeals has explained, "Prosecutorial misconduct in closing argument will be considered fundamental error when it is 'calculated to inflame the minds of jurors and arouse passion or prejudice against the defendant, or is so inflammatory that the jurors may be influenced to determine guilt on factors outside the evidence.'" *State v. Johnson*, 149 Idaho 259, 266 (Ct. App. 2010) (citations omitted).

The first instance of the prosecutor attempting to secure a verdict on a factor other than the law and evidence was when the prosecutor described the victim as follows, "She was a helpless victim, helpless adult, *like a baby*." (Tr., p.1079, Ls.9-10 (emphasis added).) This type of inflammatory comment, which represented an attempt to evoke sympathy for the victim, was wholly unnecessary and incredibly prejudicial. Our society considers no one more vulnerable or innocent than a baby. By appealing to passion and prejudice, the State violated Mr. McNeil's right to due process and a fair trial, and sought to obtain a verdict on a factor other than the evidence and the law. With respect to the second prong, whether the error was plain or obvious, Mr. McNeil notes that the law in Idaho is clear that "appeals to emotion, passion or prejudice of the

jury through the use of inflammatory tactics are impermissible." *State v. Phillips*, 144 Idaho 82, 86 (Ct. App. 2007); *see also State v. Troutman*, 148 Idaho 904 (Ct. App. 2010) (finding prosecutor's discussion of the implications of accepting its characterization of the defendant's defense on "vulnerable citizens" was an improper appeal to the emotions and passions of the jury); *see also People v. Bowie*, 607 N.Y.S.2d 248, 250 (N.Y. App. Div. 1994) (finding it improper for prosecutor to seek "to evoke sympathy for the victim . . . [by] calling him a 'Teddy Bear.'").

The second instance of the prosecutor attempting to secure a verdict on a factor other than the evidence and the law was when the prosecutor argued that Mr. McNeil's attorney had conceded his guilt on the charge of grand theft. Specifically, the prosecutor opened his rebuttal closing by stating, "I guess they concede the grand theft." (Tr., p.1095, Ls.17-18.) While it is true that defense counsel spent his closing argument addressing the two most important charges, second-degree murder and arson, he never conceded Mr. McNeil's guilt on the charge of grand theft. (Tr., p.1082, L.19 – p.1095, L.15.) By falsely claiming that defense counsel had conceded Mr. McNeil's guilt on the charge of grand theft, the prosecutor attempted to secure a guilty verdict on that charge on a factor other than the evidence and the law. With respect to the second prong of *Perry*, whether the error was plain or obvious, Mr. McNeil notes that the law in Idaho is clear that a not guilty plea constitutes a denial of all material elements of the offense charged. *See* I.C. § 19-1715 ("The plea of not guilty puts in issue every material allegation of the indictment . . . .").

The third instance of the prosecutor attempting to secure a verdict on a factor other than the evidence and the law was when the prosecutor argued in his rebuttal

closing, "We want to hold people accountable when they murder someone, yes, but we don't want it to happen. We don't want to make it up. *And he has to say that to try to get his client out of trouble.*" (Tr., p.1098, Ls.1-5 (emphasis added).) This statement implied that defense counsel did not believe in his client's innocence, and implied that a defense attorney's job is to say anything at all to attempt to secure an acquittal. Such inflammatory rhetoric represents an attack on the very foundation of our system of justice, and invited the jury to render a verdict on a factor other than the evidence and the law.

With respect to the second prong of *Perry*, whether the error was plain, Mr. McNeil notes that the attack on defense counsel's function made by the prosecutor in this case was clearly inappropriate under Idaho law. The Idaho Supreme Court has repeatedly announced that it is misconduct for a prosecutor to disparage or make personal attacks on defense counsel. *See State v. Sheahan*, 139 Idaho 267, 280 (2003) ("[I]t is misconduct for the prosecution to make personal attacks on defense counsel in closing argument.") (citations omitted); *State v. Page*, 135 Idaho 214, 223 (2000) ("It is misconduct for a prosecutor to disparage a defense attorney in closing argument.") (citing *State v. Baruth*, 107 Idaho 651, 656 (Ct. App. 1984)). In *Baruth*, the Idaho Court of Appeals concluded that it was misconduct for a prosecutor to make statements that "had the effect – if not the intent – to disparage" defense counsel. It concluded that the statements "unfairly case the role of a defendant's counsel . . . [and] were improper." One of the statements made by the prosecutor in that case was that "doubt is a defense attorney's stock and trade. They are going to market it, package it, and huckster it to the first juror in the box until the last word is out of their mouth."

Baruth, 107 Idaho at 657. The statement in this case similarly disparaged defense counsel and the role of defense counsel in our system of justice.

The fourth instance of the prosecutor attempting to secure a verdict on something other than the evidence and the law occurred when the prosecutor argued, "And that just because she was vulnerable and an easy target, it's no reason to let him get away with murder." (Tr., p.1101, Ls.23-25.) This represented yet another appeal to passion and prejudice, which is prohibited under Idaho law. *See Phillips*, 144 Idaho at 86; *see also State v. Zamora*, 803 P.2d 568, 572 (Kan. 1990) (finding reversible error in rape trial based on prosecutor's objected-to comment in closing argument that "[i]f he is found not guilty, he will get away with it again" because the comment was an improper appeal to prejudice and passion).

The fifth instance of the prosecutor attempting to secure a verdict on a factor other than the evidence and the law occurred when the prosecutor argued,

> Now, again, this is why we are here. Accountability. Mark Twain once commented that every person is born to one possession that out-values all the rest at his last breath,[[12]] and that's what the defendant stole from Natalie Davis in this case.
>
> He stole her last breath, her most valuable possession. What do we know about some of the last breaths she had? Some were spent telling him to get out. Some were spent calling the police on him. Fibbing, but calling. Some were spent calling Montana authorities.
>
> And defendant couldn't have that. That's no way of spending your last breath.

[12] The quotation that the prosecutor was attempting to quote actually reads, "Each person is born to one possession which outvalues all his others – his last breath." MARK TWAIN, *More Maxims of Pudd'nhead Wilson from Following the Equator*, *in* THE JUMPING FROG AND 18 OTHER STORIES 104 (The Book Tree 2000) (1897).

(Tr., p.1102, Ls.7-20.) This represented yet another attempt to evoke sympathy for the victim and to seek to inflame passion and prejudice. Nothing about this is relevant to whether Mr. McNeil was guilty or not guilty of causing Ms. Davis' death. It was nothing more than an inappropriate attempt to secure a verdict on a factor other than the evidence and the law.

With respect to the harmlessness prong as applied to all instances of misconduct discussed *supra*, Mr. McNeil notes that the evidence in this case was entirely circumstantial and incredibly weak, which is reflected in the fact that, with respect to Ms. Davis' death, the jury found him not guilty of the most serious charge, second-degree murder, opting instead to convict him of the lesser-included charge of voluntary manslaughter. As discussed in section I *supra*, the evidence supporting that charge was so weak that Mr. McNeil maintains that it was insufficient to support the jury's verdict. Assuming, *arguendo*, that this Court concludes that the evidence was sufficient to support a conviction for voluntary manslaughter, its weakness remains a strong indicator that the prosecutorial misconduct in this case was not harmless beyond a reasonable doubt. *See Troutman*, 148 Idaho at 910 (finding it impossible to conclude beyond a reasonable doubt that prosecutorial misconduct was harmless when "this case was not an open and shut case for the state, and Troutman presented a viable defense"). Furthermore, the latter four instances of misconduct were particularly harmful in that they occurred during the State's rebuttal argument. *See Troutman*, 148 Idaho at 909-10 ("It is also important to note that this misconduct by the prosecutor occurred in rebuttal argument. At this point in the trial the state has the last word and is in a position to leave the last impression upon the jury.").

Given the multiple instances of prosecutorial misconduct in violation of Mr. McNeil's constitutional right to due process and a fair trial, along with the weak nature of the State's case, particularly with respect to the voluntary manslaughter charge, he respectfully requests that this Court vacate the judgment of conviction and remand this matter to the district court for a new trial.

III.

The District Court Abused Its Discretion When It Imposed A Combined Sentence Of Fifty-Four Years, With Twenty-Five Years Fixed, Following Mr. McNeil's Convictions For Voluntary Manslaughter, Arson In The First Degree, And Grand Theft

A. Introduction

Mr. McNeil asserts that, in light of the mitigating circumstances present in his case, including his young age, lack of a prior felony record, and the fact that all three crimes arose out of the same incident, the district court abused its discretion when it imposed a combined sentence of fifty-four years, with twenty-five years fixed, following his convictions for voluntary manslaughter, arson in the first degree, and grand theft.

B. The District Court Abused Its Discretion When It Imposed A Combined Sentence Of Fifty-Four Years, With Twenty-Five Years Fixed, Following Mr. McNeil's Convictions For Voluntary Manslaughter, Arson In The First Degree, And Grand Theft

Mr. McNeil asserts that, given any view of the facts, his combined sentence of fifty-four years, with twenty-five years fixed, is excessive. Where a defendant contends that the sentencing court imposed an excessively harsh sentence the appellate court will conduct an independent review of the record, giving consideration to the nature of

the offense, the character of the offender, and the protection of the public interest. *See State v. Reinke*, 103 Idaho 771 (Ct. App. 1982).

The Idaho Supreme Court has held that, "'[w]here a sentence is within statutory limits, an appellant has the burden of showing a clear abuse of discretion on the part of the court imposing the sentence.'" *State v. Jackson*, 130 Idaho 293, 294 (1997) (quoting *State v. Cotton*, 100 Idaho 573, 577 (1979)). Mr. McNeil does not allege that his sentences exceed the statutory maximum. Accordingly, in order to show an abuse of discretion, Mr. McNeil must show that in light of the governing criteria, the sentences were excessive considering any view of the facts. *Id.* The governing criteria or objectives of criminal punishment are: (1) protection of society; (2) deterrence of the individual and the public generally; (3) the possibility of rehabilitation; and (4) punishment or retribution for wrongdoing. *Id.*

The Idaho Supreme Court has recognized a point first made by Justice Bistline in his dissent in *State v. Adams*, 99 Idaho 75 (1978), that in modifying sentences, the Court "has given great weight to the age of a defendant." *Broadhead* at 144 (citations omitted).

In *State v. Dunnagan*, 101 Idaho 125, 126 (1980), the Idaho Supreme Court focused upon the young age of the defendants in reducing their sentences for grand larceny. At the time of sentencing, the defendants were twenty and twenty-one years of age and both had very low IQs. *Id.* at 125. Grand larceny is punishable by a maximum term of imprisonment of twenty years. I.C. § 18-2408. The *Dunnagan* Court ruled that given the defendants' young ages and low IQs, the imposition of two consecutive

indeterminate fourteen-year sentences, which was more than the length of their natural lives to that point, was excessive and unduly harsh. *Id.*

Similarly, in *State v. Amerson*, 129 Idaho 395, 406 (Ct. App. 1996), the Idaho Court of Appeals considered, *inter alia*, the age of the defendant in reducing the length of his sentence. Amerson, who was twenty-seven years old at the time he was sentenced, would have had to serve sixty years in confinement if his sentences were not modified or restructured, and he would have been approximately eighty-seven years old at the completion of his sentences. *Id.* at 406. The Court concluded that the imposition of what amounted to a sixty-year fixed sentence for rape, forcible sexual penetration, and robbery was unduly excessive and harsh. *Id.*

Each of the crimes for which Amerson was found guilty carried a life sentence. *Id.* One of the factors the court considered in reducing Amerson's sentence was that all three charges arose from a single incident. *Id.* at 408. Another factor was Amerson's age. *Id.* The Idaho Court of Appeals reduced Amerson's sentence to a twenty-five year determinate sentence and an indeterminate term not to exceed ten years to enable him to reintegrate into society more properly. *Id.*

Mr. McNeil was thirty-one years old at the time of the offenses for which he was convicted. (Presentence Investigation Report (*hereinafter,* PSI), pp.1-2.) The combined sentence of fifty-four years imposed against him is nearly twice the length of his natural age at the time of the offenses, while the fixed portion of his sentence is nearly the length of his natural age at the time of the offenses. Additionally, given the fact that all three crimes arose out of a single incident, imposing consecutive sentences that constituted the maximum possible sentence for all three offenses was excessive.

The Idaho Supreme Court has "recognized that the first offender should be accorded more lenient treatment than the habitual criminal." *State v. Hoskins*, 131 Idaho 670, 673 (1998) (citations omitted); *see also State v. Nice*, 103 Idaho 89, 91 (1982). In both *Hoskins* and *Nice*, the Idaho Supreme Court considered, among other important factors, that the defendants had no prior felony convictions. *Hoskins* at 673; *Nice* at 90. The charges in this case represent Mr. McNeil's first felony convictions. (PSI, p.16.)

The Idaho Supreme Court has recognized that an important factor in fashioning a sentence is whether an offender enjoys the support of family and friends in his rehabilitation efforts. *See State v. Shideler*, 103 Idaho 593, 594-595 (1982) (reducing sentence of defendant who, *inter alia*, had the support of his family in his rehabilitation efforts). Mr. McNeil enjoys the support of his family, including that of his father, a retired parole officer (PSI, p.19), who "emphasized the wealth of family support available to [Mr. McNeil] in Tennessee" when discussing Mr. McNeil with the PSI writer. (PSI, p.22.) Other family members who wrote letters of support include Mr. McNeil's stepmother, Marian McNeil, his sister, Holly Holley, his aunt, Barbara McNeil Candela, and his uncle, James McNeil. (Letters of Marian McNeil, Holly Holley, Barbara McNeil Candela, and James McNeil, appended to PSI.) Additional letters of support were submitted by a number of Mr. Hardin's friends. (Letters of Brad S., Donna D'Shaun, Donnie Keeton, Fred R. Shanks, Tillie Hamontree, and Julie Kramer, appended to PSI.)

An additional mitigating factor is that Mr. McNeil was not a disciplinary problem while incarcerated awaiting trial and sentencing. According to the PSI writer, "Ada County Jail records reflect, other than a strip search upon his arrival, Mr. McNeil has not

been the subject of any Jail Topic Reports, indicating he has not presented behavioral management problems." (PSI, p.23.)

In light of the mitigating factors present in his case, including his young age, lack of any prior felony convictions, and the fact that all three crimes arose out of the same incident, Mr. McNeil asserts that the district court abused its discretion when it imposed a combined sentence of fifty-four years, with twenty-five years fixed, following his convictions for voluntary manslaughter, arson in the first degree, and grand theft.

IV.

The District Court Abused Its Discretion When It Denied Mr. McNeil's Rule 35 Motion

Mr. McNeil filed a timely Rule 35 motion setting forth the following new information:

> Since his placement at Idaho State Correctional Institute on June 1, 2012, Mr. McNeil completed 96 classes in 60 days. This programming equates to 162 hours of treatment that he has attended voluntarily. The hours include Narcotics Anonymous, Alcoholics Anonymous, Celebrate Recovery, Spiritual 12 Step, New Life Principles and Recovery 7.0 meetings.[13]
>
> The defendant has proven his rehabilitation potential by his efforts to participate in any and all treatment available to him at the Idaho State Correctional Institute.

(R., pp.283-89.) Defense counsel noted the significance of the information in light of the district court's "express[ion of] concern at sentencing as to whether or not the defendant was amenable or capable of rehabilitation."[14] (R., p.286.)

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[13] Defense counsel later filed an amended motion, clarifying that Mr. McNeil was transferred to the custody of the Department of Correction and began taking the classes on June 1, 2012, "after being allowed to begin taking classes . . . ." (R., pp.291-92.)

[14] At sentencing, the district court noted that Mr. McNeil "appears to have very serious problems with alcohol," but found "it very difficult to assess, with the incomplete

A motion to alter an otherwise lawful sentence under Rule 35 is addressed to the sound discretion of the sentencing court, and essentially is a plea for leniency which may be granted if the sentence originally imposed was unduly severe. *State v. Trent*, 125 Idaho 251, 253 (Ct. App. 1994) (citations omitted). "The criteria for examining rulings denying the requested leniency are the same as those applied in determining whether the original sentence was reasonable." *Id.* "If the sentence was not excessive when pronounced, the defendant must later show that it is excessive in view of new or additional information presented with the motion for reduction. *Id.* (citation omitted).

In light of the new information presented in support of his Rule 35 motion concerning his rehabilitative potential, along with the mitigating factors known at sentencing and set forth in section III, *supra*, Mr. McNeil asserts that the district court abused its discretion when it denied his Rule 35 motion.

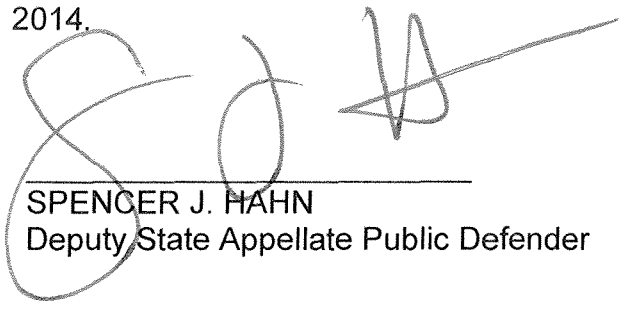
---

information submitted to me, what rehabilitation potential there is. That's very hard to say. Generally, the lack of an extensive prior record would indicate that there should be some potential for that. It's hard to say." (Tr., p.1158, Ls.8-16.) The lack of information concerning rehabilitation appears to be primarily due to Mr. McNeil's decision "not to participate very fully in the presentence process" in light of his continuing assertion of innocence. (Tr., p.1153, Ls.10-15.)

CONCLUSION

For the reasons set forth herein, Mr. McNeil respectfully requests that this Court grant his Petition for Review, vacate the judgment of conviction for voluntary manslaughter, and remand this matter for the entry of a judgment of acquittal on that charge. Additionally, he respectfully requests that this Court vacate the judgment of conviction on all charges and remand this matter for a new trial in light of the fundamental error resulting from the numerous instances of prosecutorial misconduct. Finally, if this Court does not vacate the judgment of conviction on all charges, he respectfully requests that this Court reduce the underlying sentences in his case by ordering that they run concurrently.

DATED this 21st day of January, 2014.



SPENCER J. HAHN
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 21st day of January, 2014, I served a true and correct copy of the foregoing APPELLANT'S BRIEF IN SUPPORT OF PETITION FOR REVIEW, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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